

Byrnes v A.C.&S. Inc.
2012 NY Slip Op 32451(U)
September 18, 2012
Supreme Court, New York County
Docket Number: 119504/02
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Justice

— Index Number : 119504/2002
BYRNES, JOHN T.
vs.
A.C. & S.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 119504/02
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *denied as*

*per the memo discussed
of 9.18.12.*

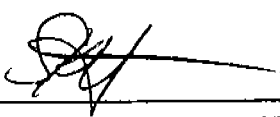
FILED

SEP 24 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9-18-12

 J.S.C.

HON. SHERRY KLEIN HEITLER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
JOHN T. BYRNES, as Executor for the Estate of
JOHN P. BYRNES,

Index No. 190429/11
Motion Seq. 001

Plaintiff,

DECISION & ORDER

- against -

A.C.&S. INC., et al.

Defendants.

FILED
SEP 24 2012
NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Karnak Corporation ("Karnak") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that plaintiff cannot show that he was exposed to asbestos by any product manufactured or sold by Karnak.

A party moving for summary judgment must demonstrate the absence of any material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR 3212(b). On a motion for summary judgment, the moving defendant must make a *prima facie* showing of entitlement to judgment as a matter of law. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). In asbestos-related litigation the plaintiff must then show facts and conditions from which the defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

Plaintiff's decedent John P. Byrnes was diagnosed with pleural disease and lung cancer in 2001. Thereafter he commenced this action to recover for personal injuries caused by his alleged exposure to asbestos-containing products. The decedent passed away before he could be deposed. However, on February 9, 2012, his son and co-worker, John T. Byrnes, was deposed in connection

with this matter. A copy of his deposition transcript is submitted as defendant's exhibit B.

The defendant asserts that its roofing paper which Mr. Byrnes testified to being used by his father did not contain asbestos. The defendant does not dispute that Karnak was the main supplier of roofing cement that Mr. Byrnes and his father worked with as journeymen roofers on large commercial roofing projects in New York in 1978 and 1979, nor that such roofing cement contained asbestos. Yet Karnak submits that the plaintiff has failed to prove that the decedent inhaled asbestos fibers from its product and that any allegation that he was exposed to asbestos from a Karnak product is speculative. In support, Karnak relies on Mr. Byrnes' testimony that the Karnak roofing cement that he and his father used was viscous when applied and did not create any dust.

However, Mr. Byrnes also testified that his father was exposed to asbestos dust from removing dried, friable, Karnak roofing cement from his skin and clothing. In this regard, his relevant testimony was (Deposition pp. 136-144):

Q . . . Just speaking strictly about the cement, how do you believe your father was exposed to asbestos from the cement itself?

A The application of mastics and cement is a very messy process. You would literally have it all over you by the time you were done . So you would go home in the evening after work and you would have cements on your clothing, your hands. The products would -- they're very, very messy. (*Id.* at 136-37).

* * * *

Q Okay. So to remove the film from your clothing, would that create dust?

A To remove it -- it was not easy to remove it. You typically -- in a commercial roofing environment you wear -- you know, you have a certain subset of work clothing that you wear over and over again. The cements would not come out of the fabrics very easily; they would be there for nearly as long as you had those work clothes. You could get the bulk of the cement off using washing techniques and things like that, but the base layer of the cement would be embedded in your work clothes (*Id.* at 138).

* * * *

Q My question is the removal of the cement, that is how you believe that your father was exposed to asbestos.

[* 4]
A I think that the cement that was on his body and on his person was the source of his exposure. (*Id.* at 139-40).

* * * *

Q Okay. And would you agree with me, as I think you just mentioned, that the cement that was on his clothing wouldn't be a dusty process; would that also be true for the cement on his body?

A No.

Q I'm sorry, no, you don't agree or no, you agree?

A No. I don't agree.

Q You don't agree, okay. So the cement on his body, the removal of that, you believe that would create dust?

A In -- in the thin layer of the cement products they would form a dry film. And so removing bulk cement from the skin and from the clothing, what would be left would become dry, yes. Is that --

Q Okay, I see what you're saying. So the initial removal wouldn't get all of the cement.... And the cement that remained you believe would dry and then it would eventually flake, is that what you're saying?

A I'm saying that there would be residual cements on the clothing and on the person and that they were very difficult to remove, especially the cements that were on the work clothing. (*Id.* at 141).

* * * *

Q Is it correct that you never saw your father remove the cement from his body after he was using a cement that you believe was manufactured by Karnak?

A I don't think that's true.

Q Okay. So you have -- do you have a specific recollection of your father removing cement that you believe is manufactured from Karnak from his body?

A Yes. (*Id.* at 142).

* * * *

Q . . . Do you have a specific recollection of your father washing cement that you believe was manufactured by Karnak that created any dust?

A. No. (*Id.* at 144).

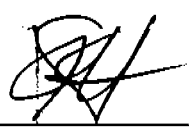
The defendant argues that Mr. Byrnes' testimony is insufficient to defeat its motion because the plaintiff does not have a specific recollection of the decedent washing a Karnak product that created dust. But considering Mr. Byrnes' testimony in its entirety, I hold there is sufficient

evidence from which a reasonable trier of fact could conclude that the decedent was exposed to asbestos by reason of such product residually adhering to his skin and clothing, and flaking off when dry. The defendant therefore has not eliminated all material issues of fact sufficient to grant summary judgement in it's favor. *See Reid, supra; see also, Dollas v W.R. Grace & Co., 225 AD2d 319, 321 (1st Dept 1996)* ("The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact . . ."); *Tronlone v Lac d'Aminate du Quebec, Ltee, 297 AD2d 528, 528-29 (1st Dept 2002)* (summary judgment is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact).

Accordingly, it is

ORDERED that Karnak Corporation's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 9-18-12 **FILED** 

 SHERRY KLEIN HEITLER
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